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FIFTH REPORT ON STATE RESPONSIBILITY

by

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Addendum

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SECTION 2

PROBLEMATIC ASPECTS OF A POSSIBLE "SPECIAL REGIME" OF RESPONSIBILITY FOR CRIMES

A. Introduction

59. Having summed up the main positions expressed in the International Law Commission, in the Sixth Committee and in the relevant literature concerning the regulations to be provided to govern the consequences of crimes, we shall now try to identify, in the present section, the principal issues that would have to be resolved for a codification of the subject. Only when guidance has been provided on such issues by the Commission will it be possible for the Special Rapporteur, on the basis of a more thorough examination of both practice and doctrine, to propose a solution for the regime of crimes that might be considered by the Commission.

60. As can be seen from article 19 of Part One and article 5, paragraph 3, of Part Two of the draft as adopted on first reading and related commentaries, 95/ crimes consist in serious breaches of erga omnes obligations designed to safeguard fundamental interests of the international community as a whole. The basic problem, therefore, is to assess to what extent the fact that the breach seriously prejudices an interest common to all States affects the complex responsibility relationship which, as explained in our previous report, 96/ arises even in the presence of "ordinary" erga omnes breaches.

61. A convenient approach is to distinguish an "objective" and a "subjective" viewpoint. We must ask ourselves:

(i) from the objective viewpoint, whether and in what way the severity of the breaches in question aggravates the content and reduces the limits of the consequences - substantial and instrumental - that characterize an "ordinary" erga omnes breach; and

(ii) from the subjective viewpoint, whether or not the fundamental importance of the breached rule involves any changes in the otherwise inorganic and not "institutionally" coordinated multilateral relations that normally arise in the presence of an

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95/ Fifth report on State responsibility by Ago (Yearbook ... 1976, vol. II, Part One, document A/CN.4/292 and Add.1 and 2, pp. 24 et seq.); report of the International Law Commission on the work of its twenty-eighth session (Yearbook ... 1976, vol. II, Part Two, pp. 95 et seq.); sixth report on State responsibility by Riphagen (Yearbook ... 1985, vol. II, Part One, document A/CN.4/389, pp. 5-8); report of the International Law Commission on the work of its thirty-seventh session (Yearbook ... 1985, vol. II, Part Two, pp. 25 et seq.).

96/ Fourth report on State responsibility by Arangio-Ruiz (A/CN.4/444 and Add.1 and 2), paras. 128-153.

ordinary breach of an erga omnes obligation under general law, either between the wrongdoing State and all other States or among the multiplicity of injured States themselves.

62. It is on these two sets of fundamental questions that we shall base the presentation of each of the specific problems posed by the consequences of crimes. Following the order we have always followed, we begin with what we term the "substantive" consequences.

B. Substantive consequences

63. As far as cessation of the breach is concerned, it does not seem that crimes present any special character in comparison with "ordinary" wrongful acts (whether or not erga omnes). 97/ This is understandable if one considers, first, that the content of the obligation of cessation is not susceptible of a "qualitative" aggravation, attenuation or modification (objective aspect); and, second, that what is involved, even in the case of delicts, is an obligation incumbent on the responsible State even in the absence of any demand on the part of the injured State or States (subjective aspect).

64. Practice shows not only that a State which is perpetrating a crime is obliged to put an end to its "criminal" conduct forthwith; it also shows us a variety of manners in which one or more injured parties may demand cessation without this giving rise to any contestation - except, obviously, on the part of the wrongdoing State - as to the lawfulness of such demand.

65. We recall by way of example what took place in two clear-cut cases of international crimes of States: i.e. the regime of apartheid in South Africa and the invasion of Kuwait. Concerning the first, the request that South Africa put an end to its policy of systematic outrage against human rights was put forth not only by international multilateral bodies, such as the Commission on Human Rights, the Economic and Social Council and the General Assembly of the United Nations, 98/ but also by States uti singuli.

97/ Preliminary report on State responsibility by Arangio-Ruiz (Yearbook ... 1988, vol. II, Part One, document A/CN.4/416 and Add.1, pp. 12 et seq., paras. 29-63), and Fourth report on State responsibility by Arangio-Ruiz (A/CN.4/444 and Add.1 and 2, paras. 128-153).

98/ One need only recall the various resolutions in which the said organs have called upon South Africa to put an end to apartheid, especially (but not solely) within the framework of the procedure instituted for "gross violations" of human rights by Economic and Social Council resolution 1503 (XLVIII) or, for example, Security Council resolutions 181 (1963), 182 (1963) and 418 (1977).

66. An example is the demands of Ethiopia and Liberia in their well-known application to the International Court of Justice against South Africa as administrator of Namibia (South West Africa). Both States called for the cessation of the practice of apartheid. 99/

67. In the case of Kuwait, one need hardly be reminded that near-immediate demands for the withdrawal of Iraqi troops were lodged both by international organizations 100/ and individual States. 101/

68. The same has occurred, moreover, in respect of Israeli operations against Lebanon. 102/

68. Far less self-evident, however, is the question which countermeasures may be adopted, and by whom, in order to obtain cessation by a State that does not comply spontaneously with cessation demands. But this point relates more properly to the "instrumental" aspects of responsibility to be discussed further on. 103/

70. Moving to reparation lato sensu, inclusive of restitutio, compensation, satisfaction and guarantees of non-repetition, the matter becomes more complex. A number of problems arise here in connection with both the objective and the subjective aspects.

71. Regarding the objective aspect, some of the forms of reparation, especially restitutio and satisfaction, are subject, in the case of mere delicts, to certain limits. One must therefore see whether, in consequence of

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99/ Points 3 and 4 of the final conclusions of the two plaintiff States of 19 April 1965, in ICJ Reports 1966, p. 69.

100/ Immediate demands for the withdrawal of Iraqi troops were made not only by the Security Council (resolution 660 (1990)), but also by the Council of the League of Arab States, which met in Cairo on 3 August 1990, and by the member States of the European Community (statement of 4 August 1990, in Kuwait Crisis: Economic Sanctions (Bethlehem and others, eds.), 1991, p. 111).

101/ Such demands were also put forth by (among others) France (Quai d'Orsay communiqué or 2 August 1990, in AFDI 1990, p. 1041) and by Switzerland (note verbale of 22 August 1990 of the Chargé d'affaires of the Permanent Observer Mission of Switzerland to the United Nations, addressed to the Secretary-General, in Kuwait crisis ..., op. cit. (footnote 100 above), p. 306).

102/ Demands for cessation have in fact been made both by the Security Council (resolutions 313 (1972), 332 (1973), 501 (1982), 508 (1982), 520 (1982), 583 (1986), 586 (1986) and 587 (1986), among others) and by individual States (France, in "Pratique française de droit international", AFDI 1982, pp. 1050-1051; and the United Kingdom, in "United Kingdom Materials of International Law", BYIL 1982, p. 534).

103/ Infra, sub-section C.

a crime, all such limits (or any of them) are subject to derogation and, if so, to what extent. One must determine, in other words, whether, in the case of crimes, the above-mentioned "substantive" obligations are more burdensome for the wrongdoing State than in the case of "ordinary" breaches.

72. A first possible derogation pertains to the excessive onerousness limitation for restitutio. One could think, for example, of the great efforts being made, for some time now, by South Africa in its internal legal system in order to comply with its international obligation to wipe out the effects of the previous regime of complete apartheid. Yet the reaction of the international community is still circumspect. A number of States have decided to gradually put an end to the sanctions and re-establish diplomatic relations only when the promised legislation is effectively passed; and they still reserve the right to assess its concrete implications. 104/

73. A second derogation might concern the prohibition of "punitive damages", of humiliating demands or of demands affecting matters generally considered to pertain to the freedom of States. One may recall, for example, the case of Israel which obtained from the Federal Republic of Germany an indemnity of 3,450,000,000 deutsche mark by way of atonement for the Nazi persecution of Jews; the territorial amputations imposed upon Germany and Italy at the end of the same war together with the elimination of any remnants of their totalitarian regimes; or, more recently, the obligations imposed on Iraq by Security Council resolution 687 (1991), relating to the destruction of arms and the determination of the borders with Kuwait.

74. A third derogation might concern demands for satisfaction or guarantees against repetition strongly affecting the area of the domestic jurisdiction of the wrongdoing State. One may recall here some of the obligations imposed upon Iraq concerning the destruction of armaments under international control, the institution and enforcement of no-fly zones et similia.

75. On the subjective side, it should be borne in mind that the consequences in question are covered by obligations which the responsible State is required to perform, unlike the case of cessation, only upon a demand by the injured party. No problem arises, obviously, with regard to the demands of the State which is the "principal victim" (if any). Indeed, if the crime was directed specifically against one or more particular States (as, for example, in the case of aggression), these would unquestionably be entitled to demand compliance with the "substantive" obligations.

76. Since, however, a crime always involves, additionally or solely, States "less directly" injured than a "principal victim", one must ask whether, in the current state of international law, each of those States is entitled to claim reparation uti singulus or whether, on the contrary, some mandatory form of coordination is required among all the injured States (to be effected, presumably, by means of institutionalized procedures), such coordination to be

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104/ See Keesing's Record of World Events, pp. 37991, 38047-38048, 38086-38087, 38270-38271, 38662-38663, 38704-38705, 38750-38751, 38798, 38850-38851, 38949, 39037-39038, 38078-39079; see also General Assembly resolution 47/116 of 18 December 1992, especially paragraph 12.

an expression, so to speak, of a will of the "international community" or of the "organized international community". Regarding the performance of the obligation in question, international practice offers examples of demands presented by individual States (other than the "principal victim", if any, of the breach) as well as by universal or regional international bodies.

77. We recall the demands for restitutio made by France 105/ and by the Council of Europe on the occasion of the Soviet intervention in Afghanistan; 106/ the demand for restitutio addressed to Portugal by the Security Council on the occasion of numerous armed raids carried out by that State against Zambia; 107/ the demand for damages addressed to South Africa by the Commission on Human Rights on behalf of Namibians imprisoned or desparecidos, their families and the future independent Government of Namibia; 108/ the demands for compensation made by the Security Council 109/ and the General Assembly 110/ against Israel and in favour of Iraq in connection with the Israeli bombing of the Osiraq nuclear power plant; the demand addressed to Iraq by the League of Arab States in connection with the "[C]ompensation of the State of Kuwait for the damage caused by the Iraqi invasion"; 111/ and the demand for guarantees of non-repetition addressed by the Security Council to the Libyan Arab Jamahiriya in relation to a direct and indirect involvement of that country in terrorist activities. 112/

78. Combining the subjective with the objective aspects, one must further ask oneself whether in the case of crimes, the limits referred to in the preceding paragraphs may under certain circumstances be overstepped either by a claim asserted in any manner by any injured State uti singulus or only by claims preceded by some form of coordination/concertation among all the injured States. Such a concertation could be taken perhaps as evidence of the will, so to speak, of the "international community as a whole".

105/ AFDI 1983, p. 907.

106/ BYIL 1981, p. 511.

107/ Security Council resolution 269 (1969).

108/ Resolution 1987/8 of the Commission on Human Rights E/1987/18.

109/ Security Council resolution 487 (1981).

110/ General Assembly resolutions 36/27 of 13 November 1981 and 41/12 of 29 October 1986.

111/ Resolution 5041-ES, adopted on 31 August 1990 by the Council of the League of Arab States.

112/ Security Council resolution 748 (1992) (especially paragraph 2).

79. Once the lex lata on all these points had been clarified, 113/ it could be possible to assess whether and to what extent it would be appropriate to provide correctifs, or radical innovations, by way of progressive development.

C. Instrumental consequences: measures involving the use of force

80. We must now turn to what we refer to as the "instrumental" aspects of international liability for State crimes, namely, to the measures that may be adopted in response to a crime. We begin with those most serious among such measures which involve the use of force. The main hypothesis is that of self-defence. This does not mean, of course, discussing again the problem of the admissibility of force by way of self-defence - a problem on which the Commission has already expressed itself in the past. 114/ We are concerned here with the legitimacy of the use of force by way of reaction to a crime, notably, a crime of aggression.

81. Above all, we feel it would be necessary for the Commission to clarify the content of a number of requirements traditionally considered to be conditions of self-defence, particularly the requirements of immediacy, necessity and proportionality.

82. It would also have to be made clear in what terms the right of "collective" self-defence includes recourse to armed force against an "aggressor" by States other than the main target of the aggression: whether, for example, such recourse is legitimate only upon an express request by the target State, whether a presumption of that State's consent suffices, or whether, in such situations, the "third" States' reaction can follow, so to speak, "automatically".

83. It would be useful if the ILC adopted a position on this series of problems even if it were found preferable not to lay down express provisions governing them but rather simply to refer to the "inherent right of individual or collective self-defence": a commentary on the meaning of such "inherent right" would in fact prevent dangerous misunderstandings.

113/ As will be explained in connection with the "instrumental" aspects (infra, sub-section C), the determination of lex lata might indeed pose particular problems when it comes to weighing the legitimacy, in the light of the general and conventional law in force, of the intervention of international bodies in the management, so to speak, of the consequences of certain crimes of States.

114/ See addendum to the eighth report on State responsibility by Ago (Yearbook ... 1980, vol. II, Part One, document A/CN.4/318 and Add.1-5, pp. 51 et seq., paras. 82-124; commentary of the Commission to article 34 of Part One of the draft articles (Yearbook ... 1980, vol. II, Part Two), pp. 52 et. seq.; third report on State responsibility by Arangio-Ruiz (A/CN.4/440 and Add.1, paras. 97-102; fourth report on State responsibility by Arangio-Ruiz (A/CN.4/444 and Add.1-3), paras. 58-69).

84. However, the problem of resort to force in response to an international crime is not solely a question of self-defence against armed attack. One must further ask oneself whether armed measures are not admissible also in order to bring about the cessation of crimes other than aggression. In this case, too, the problem presents above all an objective aspect. This consists in establishing whether resort to force in order to obtain cessation is admissible or not in circumstances other than those justifying self-defence. Were it found to be admissible, there would remain to be seen first whether resort to force would be subject to limits and conditions; secondly, whether force would be admissible upon any and every type of crime or only certain types.

85. Among the problems which must, in our opinion, be considered in this context are that of armed support to peoples oppressed by "alien domination" or more generally by regimes committing grave violations of the principle of self-determination; 115/ and that of armed intervention against a State responsible for large scale violations of "fundamental" human rights or perpetrating, for example, genocide or violent forms of "ethnic cleansing". 116/

115/ See in this connection, General Assembly resolution 3070 (XXVIII) of 30 November 1973, paras. 2 and 3, and Security Council resolution 424 (1978). See also the decision of the International Court of Justice in the case of the Military and Paramilitary Activities In and Against Nicaragua (1986), which affirms the legitimacy of armed assistance to opposition movements in the case of civil wars, though it makes no pronouncement on assistance to national liberation movements (ICJ Reports 1986, p. 108, para. 206).

116/ It should be noted that some authors believe that, in addition to self-defence, only humanitarian intervention would justify resort to armed force. The practice of some States seems to indicate, however, that humanitarian reasons have been adduced by the intervening State, not in isolation but in conjunction with self-defence from an armed attack. One may recall the reasons adduced by India to justify intervention in Bangladesh (1971): Official Records of the Security Council, Twenty-fifth year, 1606th meeting, 4 December 1971, paras. 158-163. On this case see Lillich, International Human Rights, Problems of Law, Policy, and Practice, II ed., Boston, Toronto, London, 1991, pp. 565 et seq.. Another instance is the invasion of Kampuchea by Viet Nam (1978). According to one commentator, "Viet Nam never claimed to have given military help to the rebels, nor to have intervened to re-establish human rights in Kampuchea" (N. Ronzitti, Rescuing Nationals Abroad Through Military Coercion and Intervention on Grounds of Humanity, Dordrecht, Boston, Lancaster, 1985, p. 99. See the Vietnamese statement before the Security Council in Official records of the Security Council, Thirty-fourth year, 2108th meeting, 11 January 1979, paras. 126-7 and 135-6). According to the same author (ibid., pp. 102 et seq.), humanitarian reasons would not have been invoked to justify the Tanzanian intervention in Uganda in 1979. The only justification would have been on that occasion self-defence against an armed attack (N. Ronzitti, op. cit.). For other comments on the same case see R. Lillich, op. cit., pp. 74 et seq..

86. With regard to hypotheses such as these, if one deems the use of armed force admissible de lege lata or desirable de lege ferenda, one should ask in any case whether this would constitute the "typical" sanction of a crime (i.e., a reaction against the wrongdoing State under the law of State responsibility), or whether it would correspond to a different ratio. We have in mind, for example, the ratio underlying the "state of necessity" or "distress" - circumstances which do indeed rule out illegitimacy but, unlike self-defence, are not characterized by the fact of authorizing a direct reaction against the perpetrator of a particularly serious international breach. Such hypotheses would fall outside the specific regime of responsibility for crimes.

87. Another problematic aspect of resort to force by way of reaction to a crime - always from the objective standpoint - is the question whether armed countermeasures are admissible when they are intended not to bring about the cessation of a crime currently in progress but to obtain reparation lato sensu or adequate guarantees of non-repetition.

88. We refer, for example, to the debellatio of a State that started a war of aggression, to the imposition of a military occupation regime on its territory by the victorious powers or to any other "sanctions" imposed by force of arms on a State required to "undo" all the consequences of the crime. 117/ Are measures of that kind at present legitimate? If so, might they follow upon any crime, or are they permissible only by way of reaction against a certain type of crime, specifically a war of aggression?

117/ The situation of Germany after the conclusion of the Second World War may be of interest in this connection. Kelsen (in "The Legal Status of Germany According to the Declaration of Berlin", AJIL 39, 1945, pp. 518 et seq., at p. 518) states that "... the legal status of Germany is not that of 'belligerent occupation' in accordance with Articles 42 to 56 of the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land of 1907". However one may wish to define that status (see in this connection, among others, Oppenheim-Lauterpacht, International Law, vol. II, 7th ed., pp. 602 et seq.). What is of interest for our purposes is that the occupation of Germany was intended, among other things, to guarantee a complete change of political system as well as to preclude the possibility that German industry endanger international peace in the future.

Turning to a more recent case, the possibility that force be used to guarantee the disarmament obligations imposed upon Iraq by Security Council resolution 687 (1991), seems to be contemplated by paragraph 33 of that resolution (which makes the cease-fire conditional on Iraqi acceptance of the terms imposed) and by paragraph 34 (providing that the Council remains seized of the case and may decide "such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area").

D. The problem of the faculté of reaction: "subjective-institutional" aspects

89. Even more important - and more difficult - are the problems arising with regard to the "subjective" aspects of the instrumental consequences of crimes involving armed force. They relate essentially to the faculté of adopting armed measures, be it in response to aggression or possibly to crimes other than aggression.

90. The problem might be stated roughly in the following terms: does the admissibility of armed measures vary according to whether they are taken by one or more injured States uti singuli or by the community of States uti universi? In other words, could perhaps such measures be considered inadmissible if they were resorted to unilaterally by one or a small group of injured States, but legitimate if they were the expression of a "common will" ("will" of the international community or of the "organized international community")?

91. This is obviously a problem central to the entire regime of crimes, and not just to the regime of armed measures aimed at cessation. It arises, as already mentioned, in connection with a number of "substantive" consequences and affects all the "instrumental" consequences whenever the regime of international crimes of States involves the possibility of a competence of the "international community as a whole" (or of the "organized international community").

92. Widening the analysis from the particular area of armed measures considered so far to the broader area of countermeasures in general, we should now try to identify the facets of this "subjective-institutional" problem.

93. Practice offers more than one example of injured States dealing with the consequences of a very serious breach - especially one still in progress - not "inorganically" (uti singuli) but through the intervention of an international body belonging to a "system" of which the wrongdoing State is also a member. This is especially true of the organs of the United Nations and in particular, with regard to the adoption of measures, of the Security Council. We shall deal here only briefly with examples from a body of practice that will be examined in greater depth in the next report, when - thanks to the guidance we expect from the Commission - we shall try to provide answers to the problems presented here.

94. Suffice to refer, for the present purposes, to the following cases of "organic" reaction to very serious breaches:

(i) regarding the adoption of armed measures: Security Council resolution 221 (1966), granting consent for the use of force by the United Kingdom to render effective the embargo against Rhodesia; Security Council resolution 665 (1990) and 678 (1990), whereby consent was given for the use of force against Iraq as "aggressor" vis-à-vis Kuwait;

(ii) regarding the adoption of measures not involving the use of force: Security Council resolutions 180 (1963) and 183 (1963), urging the

implementation of an arms-trade embargo against Portugal on account of its repressive policy towards its colonies; Security Council resolutions 232 (1966) and 253 (1968), establishing an economic embargo against Rhodesia; Security Council resolution 418 (1977), establishing an arms embargo against South Africa by reason of its apartheid policy; Security Council resolution 748 (1992), imposing an arms embargo and an aerial communications blockade against Libya owing to its involvement in terrorist activities; and Security Council resolution 757 (1992), deciding on a series of economic measures against Serbia and Montenegro.

95. From a number of quarters, the precedents of the kind of those recalled in the preceding paragraph are invoked - as noted - in support of the notion that the competence to adopt sanctions against particularly serious international delinquencies does not, and should not, belong to States uti singuli. That competence would or should rather belong de lege lata - and/or de lege ferenda - to the so-called "organized international community" as represented by the United Nations and specifically by the Security Council as the United Nations organ endowed with the greatest powers of action. 118/

96. A considerate juridical answer to this question for purposes of codification and/or progressive development of the legal consequences of international crimes of States as defined in article 19 (we refer, of course, to a considerate juridical answer as distinguished from mere constats of what so far may have occurred with regard to given acts or situations would require an analysis of problems situated at the very apex of the international legal system. Those problems range from the nature of the international community and the inter-State system and the concept of the "organized international community" to the nature of the United Nations and the functions and powers of

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118/ For the relevant literature see supra paras. 52-55 of the second addendum to this report (A/CN.4/453/Add.2). In the ILC this view was shared by Ago (Yearbook ... 1976, vol. I, pp. 58, 66, 90); Yassen (ibid., p. 63); Sette Camara (ibid., p. 68); Vallat (ibid., p. 69); Martinez Moreno (ibid., pp. 70-71); Ramangasoavina (ibid., p. 76); Kearney (ibid., pp. 76-77); Tsuruoka (ibid., p. 78); Rossides (ibid., pp. 82-83); Ustor (ibid., p. 84); El-Erian (ibid., pp. 85-87); and Bilge (ibid., p. 87). See also more recent intervention on this matter in the ILC: Ushakov (Yearbook ... 1982, vol. I, pp. 235 and 239); Evensen, (ibid., p. 214); Yankov (ibid., p. 237); Flitan (Yearbook ... 1983, vol. I, p. 105); Al-Qaysi (ibid., p. 114); Balanda (ibid., p. 123); Koroma (ibid., p. 129); Jagota (ibid., p. 127); Barboza (ibid., p. 133); and McCaffrey (ibid., p. 141).

Doubts regarding the legal correctness and the political appropriateness of relying upon the mechanism provided by the Charter for the maintenance of international peace and security were expressed by Paul Reuter (Yearbook ... 1984, vol. I, p. 278), Malek (ibid., p. 310), and Castañeda (Yearbook ... 1976, vol. I, p. 245). Among States a similar view was expressed by Japan, (A/C.6/31/SR.21, para. 8); Australia (A/C.6/31/SR.27, para. 20); and Spain (Yearbook ... 1982, vol. II, Part One, doc. A/CN.4/351 and Add.1-3, p. 17).

its organs. It is mainly because of the difficulty and high sensitivity of issues of such legal and political magnitude and of his inability to dispose of them on the "simplistic" basis on which they could be solved by identifying law with fact that the Special Rapporteur has chosen to refrain from presenting any proposals on the consequences of international crimes of States before obtaining guidance from the Commission. Indeed, he can only try for the moment, in this area more than in any other, to identify the main issues on which the debate should bear.

97. Leaving aside for the moment the more general problems, the central issue is whether and to what extent the various functions and powers of United Nations organs in the areas of international law covered by the said article 19 are (de lege lata) or should (de lege ferenda) be made legally suitable for the implementation of consequences of international "crimes" of States. Only after solving such a set of problems would it be possible to determine:

(a) de lege lata, whether and to what extent the existing functions and powers of United Nations organs or any one of them (General Assembly, Security Council, ICJ, etc.) are such as to cover the treatment of international delinquencies of the kind of those contemplated in article 19, namely, for the determination of the existence, the attribution and the consequences of such delinquencies;

(b) de lege ferenda, whether and in what sense the existing powers and functions of the said organs should be legally adjusted to such specific tasks as the determination of the existence, the attribution, and the consequences of the internationally wrongful acts in question;

(c) both de lege lata and/or ferenda - more particularly - to what extent the above functions and powers of United Nations organs affect or should affect the facultés, the rights or the obligations of States to react to any of the internationally wrongful acts in question, either in the sense of substituting for individual reactions, or in the sense of legitimizing, coordinating, imposing or otherwise conditioning such individual reactions.

98. As regards the first question - question (a) in the preceding paragraph - one should determine whether a competence of United Nations organs (or any one of them) to deal with delinquencies contemplated in article 19 can be drawn from the United Nations Charter or any supervening rule of customary international law. It must be stressed, however, that the question is not simply whether United Nations organs have in fact taken some action (decision, recommendation or more concrete measures) with regard to State conduct of the kind indicated in paragraph 3 of the said article. The question is, de lege lata, whether any United Nations organs have exercised, as a matter of law (written or unwritten), the specific function of determining that such conduct occurred and that it constituted a crime of one or more given States, and of determining the liability of the State(s) concerned and applying sanctions or contributing to the application thereof. Only on such a basis could one see whether a legally organized reaction to international crimes of States is provided de lege lata, namely by the present structures of the so-called "organized international community".

99. If one combines the various kinds of international crimes contemplated in subparagraphs (a), (b), (c), and (d) of paragraph 3 of article 19, on the one hand, with the functions and powers of United Nations organs, on the other hand, one finds it difficult to answer the above question. Considering the purpose of the present section, we confine ourselves to pick a number of examples from a list that would otherwise be longer.

100. Ratione materiae, the General Assembly - the most representative body of the inter-State system - is surely, under the Charter, the competent organ for the function of promotion and protection of human rights and self-determination of peoples. 119/ At the same time, the General Assembly is not endowed by the Charter with such powers as would enable it to produce an adequate reaction to violations of human rights and self-determination of peoples of the kind contemplated in subparagraphs (b), (c) and (d) of paragraph 3 of article 19. In the said areas the Assembly can only promote the adoption of non-binding instruments, create subsidiary bodies, and, more generally, address recommendations to States collectively or individually. At most, it can recommend to the Security Council an "intervention" on the basis of Chapter VII.

101. It would seem, therefore, that with regard, inter alia, to wrongful acts of the kind contemplated in subparagraphs (b), (c) and (d) of paragraph 3 of article 19, the Assembly cannot go beyond non-binding declarations of unlawfulness and attribution and non-binding recommendations of reaction by States or by the Security Council. 120/ We leave out, for the moment, the crime contemplated in subparagraph (a) of the same provision - obviously a matter where the main competence lies not with the General Assembly.

102. The Security Council, for its part, is competent ratione materiae for the maintenance of international peace and security and the powers the Council is endowed with under Chapter VII and Articles 24 and 25 are indeed in principle of such a nature as to enable it to provide, directly or indirectly - but

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119/ Under Article 13.1 (b) of the Charter, "The General Assembly shall initiate studies and make recommendations for the purpose of ... promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion". Article 55, read in connection with Article 60 of the Charter, gives to the General Assembly the main competence in the area of international economic and social cooperation, "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". On the leading role of the General Assembly in these matters see, inter alios, B. Simma, Die Charta der Vereinten Nationen, Munch, 1991, p. 319; L.M. Goodrich, E. Hambro, A.P. Simons, Charter of the United Nations, New York-London, 1969, II ed., pp. 453 et seq.; G. Guarino, Autodeterminazione dei popoli e diritto internazionale, Napoli, 1984, passim.

120/ It is doubtful that any contrary inference could be drawn from such well-known episodes as the revocation of the Namibia/South-West Africa mandate or the Uniting for Peace resolution.

tendentially always effectively - for an adequate reaction in the form of economic, political or military measures against, first of all, that most serious attempt against peace which is defined as the "crime" of aggression in subparagraph (a) of paragraph 3 of article 19. Secondly, the Council may react through the said measures against any other "crime", among those envisaged in subparagraphs (b), (c) and (d) of paragraph 3 of article 19 which, albeit ratione materiae within the competence of the General Assembly, may come under the Council's powers whenever it falls within one of the hypotheses of Article 39 of the Charter ("threat to the peace, breach of the peace or act of aggression").

103. No lawyer could fail to note, however, that the Security Council is empowered to assess discretionally any situation involving a threat to the peace, a breach of the peace or an act of aggression with a view to maintaining or restoring international peace and security. The Council has neither the constitutional function nor the technical means to determine, on the basis of law, the existence, the attribution or the consequences of any wrongful act, whether "delict" or "crime". The Council's competence to decide discretionarily on the existence of one of those situations is in principle confined to the purposes of Articles 39 and following of Chapter VII of the Charter. That Chapter and the other relevant Charter provisions do not seem to cover the assessment of responsibility except for the determination of the existence and attribution of an act of aggression.

104. The above consideration, however, does not dispose entirely of the issue of the Council's competence. Although that body has not been entrusted by the drafters of the Charter with the task of determining, attributing and sanctioning the serious breaches in question, a different situation might exist at present. The question may indeed be asked, in particular, whether recent practice does not show that the scope of the Council's competence has undergone, since the overcoming of the stalemate which previously characterized that body's functioning, an evolution with regard precisely to the "organized reaction" to certain types of particularly serious international delinquencies. We refer to some recent resolutions of the Security Council which do not seem to be easily justifiable on the basis of the powers invested in it expressly by the Charter. These resolutions include in particular resolution 687 (1991), at least for the part imposing upon Iraq the reparations for "war damage" and the modalities of assessment and payment thereof; resolution 748 (1992) in which the well-known Article 39 requirements are understood so broadly as to allow the taking of measures against the Libyan Arab Jamahiriya for the latter's failure, in good substance, to extradite the alleged perpetrators of a terrorist act; and resolution 808 (1993) on the establishment of an ad hoc international tribunal for the prosecution and trial of crimes committed by members of the various factions presently in conflict in the territories of the former Republic of Yugoslavia. 121/

121/ The appreciation of this recent practice of the Security Council has already been the object of scholarly attention. We recall, in particular, G. Cotterau, "De la responsabilité de l'Irak selon la résolution 687 du Conseil de Sécurité, 37 AFDI (1991), pp. 99-119; Maranhu, The Implementation of Disarmament and Arms Control Obligations Imposed upon Iraq by the

105. In order to affirm that the practice in question concurred or concurs to the creation or consolidation of the Council's competence in the area of State responsibility for crimes (a conclusion which would, in our view, be problematic), one should produce convincing arguments to the effect that it is a "juridically decisive" practice. One should notably prove that the practice in question is a law-making practice either within the Charter system (the so-called United Nations law) or within general international law. It should be proved precisely that the practice in question would either constitute, so to speak, a "physiological" application, to the Council's action, of the "implied powers" doctrine, or materialize a more or less "instant" customary rule or a tacit agreement accepted or adopted by the United Nations membership and apt as such to derogate from the written provisions of the Charter. Were the latter to be the case, one should be able, of course, to indicate and demonstrate the precise content that such a rule would have assumed in derogation from the Charter.

106. The only existing permanent body possessing, in principle, the competence and technical means to determine the existence, attribution and consequences of an internationally wrongful act - including possibly a crime of State - is the International Court of Justice. It is indeed the function of the Court "to decide in accordance with international law" (Article 38.1 of the Statute); and its pronouncements - concerning, in our case, the existence and legal consequences of an internationally wrongful act - possess "binding force between the parties" to the dispute (Article 59 of the Statute). These two features of the Court's function - not to mention its composition - would surely make the Court more suitable than other United Nations organs. There are, however, two sets of major difficulties, inter alia, deriving from other features of the ICJ's system as at present constituted.

107. The first set of difficulties derives from the essentially voluntary source of any State's subjection to the exercise of the Court's functions, such subjection being only for marginal purposes (such as the determination of preliminary issues) a direct consequence of participation in the Statute. For the Court to be entitled to exercise its jurisdiction with regard to a crime, its competence would have to derive from a prior acceptance by the alleged wrongdoer of the Court's jurisdiction in such terms as to allow one or more injured States - including, one would think, the so-called "indirectly injured" States - to summon unilaterally the alleged wrongdoer before the Tribunal. This condition could exist either by virtue of the acceptance by

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Security Council, ZaöRV (1992), pp. 781-803; M. Weller, The Lockerbie Case: a Premature End to the "New World Order"? African Journal of International and Comparative Law (1992), pp. 302-324; Ch. Tomuschat, "The Lockerbie Case before the International Court of Justice", The Review, 1992 (No.48), pp. 38-48; W.M. Reisman, "The Constitutional Crisis of the United Nations, AJIL, 1993, pp. 83 et seq.; M. Bedjaoui, "Du Contrôle de Légalité des Actes du Conseil de Sécurité", Nouveaux Itinéraires du Droit. Hommage à François Rigaux, Bruxelles, 1993, pp. 69-110; G. Gaia, "Réflexions sur le rôle du Conseil de Sécurité dans le nouvel ordre mondial", RGDIP, 1993 (à paraître). See also the Kiel Institute volume on The Future of International Law Enforcement. New Scenarios - New Law? (J. Delbrück ed.), Berlin, 1993, containing a debate on writings by Reisman, Farer, Rubin, Schreuer.

all States of the so-called "optional clause" of Article 36.2 of the Statute or by virtue of the fact that the injured State or States taking the initiative happened to be parties, together with the alleged wrongdoer, in bilateral otherwise subjectively limited instruments envisaging the possibility of unilateral application. The only other way to empower the Court to pronounce itself would be the improbable ad hoc acceptance of its jurisdiction by the alleged wrongdoer itself.

108. A second set of difficulties - to confine ourselves to the most easily visible ones - is the almost total absence, at the side, so to speak, of the ICJ, of organs juridically empowered :

(i) to investigate the facts in the presence of which the existence of an internationally wrongful act and its attribution could be preliminarily ascertained;

(ii) to play the role of "public prosecutor" in bringing the case to Court; and

(iii) to determine the "sanctions" and impose the implementation of the supposedly "penal" pronouncement of the Court (except for the Security Council's function under Article 94 of the Charter).

109. In particular, the implementation of any State's liability pronounced by the Court would escape any control, so to speak, of the Court itself. Any "sanction" other than the mere finding of the breach and its attribution should have thus to be determined and applied either by the injured party or parties or to be left to the discretional action of other United Nations bodies.

110. We finally move to the question whether and in what sense the existing functions and powers of United Nations organs should or could be legally adjusted to such specific tasks as the determination of the existence, the attribution and the consequences of international crimes of States (subparagraph (b) of paragraph 94 supra). Although this is the issue on which we are most anxious to obtain guidance from the Commission, we submit a few suggestions in view of a possibly greater involvement of the Security Council in the "organized reaction" to State crimes.

111. As everybody knows, the Security Council is an organ of restricted composition, in which some members enjoy a privileged status for the purpose of collective action. A question naturally follows: - if it is true that there exists a competence of the "international community as a whole" for sanctioning State crimes, is the Security Council, as at present constituted and functioning, truly capable of giving expression, by its deliberations, to the "will" of that community?

112. The Council is a political body entrusted with the essentially political function of the maintenance of peace. This entails a number of consequences which could be summed up as follows:

(i) the Council operates with a very high degree of discretionality. It acts neither necessarily nor regularly in all the situations

that would seem to call for the exercise of its competence. It operates on the contrary in a selective way;

(ii) the Council is not bound to use uniform criteria in situations which may seem to be quite similar. Consequently, crimes of the same kind and gravity as others can be treated differently or not be treated at all.

(iii) the very nature of the Council determinations seems to exclude any duty on its part to motivate its decisions or its action or inaction. The discretionary and possibly arbitrary character of the organ's choices is thus aggravated by the fact that the lack of motivation precludes contemporary or subsequent verification of the legitimacy of its choices.

113. The said problematic features are perhaps acceptable - although not without reservations - as unavoidable inconvénients of the prevention and repression of aggression and other serious breaches of the peace. In such hypotheses, where a timely reaction is indispensable, one can accept to sacrifice, in a measure, objective assessment of any guilt and liability to the compelling necessity of safeguarding the peace, reducing bloodshed and destruction and maintaining a minimum degree of order. One is very close here to that function which is typical of self-defence (vim vi repellere) and one can accept, for lack of a better solution, that the political body's vis be deployed without the guarantees of a judicial process, which is inevitably problematic and mainly too slow.

114. Be it as it may with regard to aggression, the propriety of relying too much on political bodies for the implementation of liability for State crimes becomes highly questionable with regard to the other hypotheses contemplated in paragraph 3 of article 19. The delinquencies of the kind described in subparagraphs (b), (c) and (d) of that paragraph should be met - at least de lege ferenda - by judicial means. The history of the penal law in national societies shows that, once the repression of criminal offences is entrusted to more or less centralized organs, the action of such organs is almost invariably characterized by such features as:

(i) subjection to the rule of law, procedural as well as substantive, no ad hoc penal law provisions or extraordinary or "special" tribunals being normally tolerated in a civilized society;

(ii) regular, continuous and systematic conduct of criminal prosecution and trial as evidenced primarily by the mandatory nature of the action of penal law institutions;

(iii) impartiality - or "non-selectivity" - of such action, with regard to the pronouncements of criminal courts but also, and primarily, with regard to the investigation and prosecution of any crime knowledge of which is available.

115. For the reasons set forth in preceding paragraphs, the Security Council's action does not seem to be of such a nature - given the organ's relevant features and mode of action - as to meet the elementary but fundamental

requirements of criminal justice referred to above. Were the Commission to suggest in its project - de lege ferenda - that the main task of implementation of the international community's "organised reaction" to crimes of States remains with the Security Council, it would have to devise ways and means of reducing the serious gaps represented by the said factors. 122/

116. A further matter on which guidance from the Commission is desirable relates to the kind of dispute settlement provisions to be included in Part Three of the project in order to cover controversies arising in connection with a State crime. This matter, dealt with in subparagraph (b) of article 4 of Part Three as proposed by our predecessor in 1985-1986, is not covered by the draft articles of Part Three (and Annex thereto) proposed in paragraph 96 of Chapter One of the present report (A/CN.4/453/Add.1). The Special Rapporteur believes that the Commission should consider the possibility of improving the 1985-1986 proposal of Professor W. Riphagen.

117. A last issue (identified in subparagraph (c) of paragraph 97) is the relationship between the reaction of the "organized community" through international bodies, on the one hand, and the individual reactions of States, on the other hand. Indeed, the recognition de lege lata or proposal de lege ferenda of a competence of the "organized community" to adopt measures against a "criminal" State poses the problem of harmonizing the exercise of that competence with the carrying out of those measures (be they many or few, armed or not) which all or certain injured States might still be entitled to adopt unilaterally (uti singuli or through regional arrangements) against any given crime. Leaving aside well-known cases of aggression (and consequent self-defence), there have been not a few cases in which both "institutionalized" measures (originating in universal or regional organizations) and measures decided upon unilaterally by individual States or groups of States have been adopted (not always in an orderly fashion) in

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122/ A number of correctifs to the current decisional procedures of the Security Council with particular reference to that body's role in the "organized reaction" against major breaches, are being envisaged by some of the cited commentators of the Council's recent practice (but see also the less recent proposals put forward by the authors cited in footnotes 89 and 90 to paragraph 56 of the second addendum to this report (A.CN.4.453/Add.2)). Some writers propose, for example, resort to avis préventifs of the ICJ prior to Security Council action (B. Simma, in The Future of International Law Enforcement, p. 145; Klein, "Paralleles Tätigwerden von Sicherheitsrat und Internationalen Gerichtshof bei friedensbedrohenden Streitigkeiten", in Festschrift Mosler, pp. 481, et seq. A more substantial contribution by the ICJ for the control of legality of the Security Council action (by a broadening of the Court's competence either ratione personae or ratione materiae is suggested also by M. Bedjaoui, "Du contrôle de légalité des actes du Conseil de Sécurité", op. cit. (footnote 121 above) pp. 69-110, at pp. 88 et seq. Other writers propose instead a more incisive role of the General Assembly. In that sense F. Rezek International Law, Diplomacy and the United Nations in the Late Twentieth Century, Gilberto Amado Lecture delivered on 2 July 1991 before the ILC, pp. 4-5; and W.B. Reisman, The Constitutional Crisis ... op. cit. (footnote 121 above). The latter proposes the setting up of an ad hoc committee of the Assembly.

reaction to the same crime. Two examples will suffice: one concerns the sanctions against South Africa, 123/ and the other the measures against Serbia and Montenegro decided upon both by the Security Council resolutions 757 (1992) and 781 (1992) and other bodies and, individually, by some States. 124/ Multiple and difficult issues are raised by such cases also.

E. Measures not involving force. The problem of the attenuation of the limits of recourse to countermeasures

118. Resort to measures short of force in reaction to a crime does not, unlike the adoption of measures involving force, give rise to questions of admissibility - such questions being generally settled in the affirmative with respect to any erga omnes breach. Rather, the problem which arises here is that of the possible aggravation of the measures taken by way of reaction to crimes (as compared to delicts). Such aggravation might result from the removal or the attenuation of the conditions or limitations to which resort to countermeasures in reaction to ordinary wrongful acts (delicts) is subjected. We refer to both "substantive" and "procedural" conditions and limitations.

119. Regarding the "procedural" limits - namely the conditions of the type described or implied in articles 11 and 12 of Part Two of the draft, as proposed in 1992 125/ - there arises in particular the question whether in the case of crimes, resort to countermeasures is not or should not be admissible even in the absence of prior notification and prior to the implementation of available dispute settlement procedures. It may, indeed, be doubtful whether, for crimes, in contrast to the case of "ordinary" breaches, the need to fulfil such preliminary requirements should continue to exist, as

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123/ Numerous States and international organizations adopted economic measures against that country during the 1980s, in reaction to its policy of apartheid (see, for example, the measures decided upon by the EEC, in ILM, 1985, p. 1479; the measures of Scandinavian States, Canada, France, Japan, the United States, the United Kingdom, Israel and Kenya, in RGDIP, "Chronique des faits internationaux", 1986, pp. 173 et seq., and 1987, vol. I, p. 587, and vol. II, pp. 916-917 and 1036). The Security Council, in its resolution 589 (1985), took the opportunity to praise "Those States which have already adopted voluntary measures against the Pretoria Government", urged them to adopt new provisions, and invited those which had not yet done so to follow their example.

124/ Regarding the measures adopted by the London Conference "on the Former Yugoslavia" (26-27 August 1992), see ILM, vol. XXXI, 1992, pp. 1539 et seq. One must recall, in this connection, paragraph 4 of resolution 770 (1992) in which the Council requested States "to report to the Secretary-General on measures they are taking in coordination with the United Nations to carry out this resolution".

125/ Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10 (A/47/10), footnotes 42 and 44.

some seem to feel. 126/ A recent case of truly sudden adoption of measures occurred following the invasion of Kuwait by Iraq. No less than 15 States, in fact, adopted economic measures on their own a few days after the invasion, before any attempt was made to resolve the question by means of dispute settlement mechanisms. Those measures preceded even the adoption of measures by the Security Council itself. 127/

120. A first question here is whether the presumed "special" regime of crimes is not in reality ascribable either to the particular nature of the measures envisaged - e.g., "interim measures" or any other measures admissible even for mere delicts in that they are compatible with the simultaneous or subsequent resort to amicable settlement procedures 128/ - or to the particular situation brought about, in the particular case, by the breach - e.g., a state of necessity or a détresse situation, i.e., circumstances excluding lawfulness, regardless of the existence of a crime or even of a delict.

121. Secondly, if resort to countermeasures in case of crime were found to be subject to attenuated or minimal "procedural" conditions, it would also be necessary to determine whether this applies to any type or only to certain types of crimes: those, for example, "which have a continuing character" and are still in progress or those that violate principles of essential importance for the maintenance of international peace and security.

122. As regards the "substantive" limitations, their possible attenuation seems conceivable with regard to the admissibility:

(i) of extreme measures of an economic or political nature;

(ii) of measures affecting the independence, the sovereignty or the domestic jurisdiction of the wrongdoer;

(iii) of measures affecting "third" States;

(iv) of "punitive" measures.

A brief illustration of these four possibilities is set forth in the following paragraphs.

126/ See on this question paragraph (3) of the commentary to article 30 of Part One of the draft in Yearbook ... 1979, vol. II, Part Two, p. 116. See also the authors recalled in the second addendum to the fifth report (A/CN.4/453/Add.2, para. 42, footnotes 60-62 and paras. 48-49, footnotes 74-75).

127/ See The Kuwait Crisis ..., op. cit. (footnote 100 above), vol. I, p. XXIII.

128/ See draft article 12, paragraph 2 (b) and (c) in the fourth report on State responsibility (A/CN.4/444 and Add.1 and 2, p. 40 of the main document).

123. As regards point (i) above, one important attenuation might apply to coercive measures of an economic or political nature. If it is true that, in respect of a State that has committed a mere delict, it is not permissible to resort to measures of economic strangulation, is this equally true in respect of a State that has committed a crime, especially if it does not desist from the unlawful conduct?

124. International practice is not wanting in indications that bespeak a more severe configuration of economic measures in case of crime. Suffice it to recall Security Council resolutions 661 (1990), 665 (1990) and 670 (1990), relating to severe economic measures against Iraq, and resolutions 713 (1992), 757 (1992) and 787 (1992) relating to economic measures against Serbia and Montenegro.

125. With respect to point (ii) above, another attenuation might concern the prohibition of measures affecting the independence, the sovereignty or the domestic jurisdiction of the wrongdoing State. Examples could be forms of direct interference into the target State's trade relations and the subjection to personal jurisdiction of the responsible officials of the target State, such officials being otherwise protected by immunity.

126. In the latter case, the problem would obviously be connected with that of individual responsibility for war crimes, crimes against peace and crimes against humanity. From our standpoint, however, one should simply ascertain whether the prosecution of individual perpetrators by States injured by an international crime can also properly be considered a lawful form of sanction against the wrongdoing State. 129/

129/ This might be the case of exercise of jurisdiction that would otherwise be "inadmissible" with respect to an official who was the material perpetrator of conduct that constituted (or contributed towards constituting) an international crime of State. Pointers along these lines might be found, on the one hand, in the recent jurisprudence of the United States courts (from the Filartiga vs. Pena-Irala case), though this relates to civil jurisdiction; and on the other, in the provision of obligations - primary obligations - to punish (or extradite) individuals responsible for delinquencies contemplated by important treaties. Reference is made here to article 4 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, article III of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, and article 5 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Regarding prosecution in the case of individual responsibility for violations of international humanitarian law, attention should also be called to Security Council resolution 808 (1993). After recalling its previous request for cessation ("that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law"), the Council decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991".

127. As regards point (iii) above, a further alternative aspect relates to the admissibility of measures prejudicial to the rights of States other than the law-breaking State. As proposed last year in draft article 14, paragraph 1 (b) (iv), the legitimation of countermeasures against a wrongdoer does not extend, in the case of delicts, to countermeasures involving third States. Can that limitation be overstepped in reacting to a crime? It is indeed quite possible that, owing to the economic interdependence among States, the adoption of collective measures be detrimental not only to the wrongdoing State but also to States having no connection with the commission of the crime. Can such a consideration prevent the adoption of measures? Or, does it simply, as maintained by some, call for simultaneous or subsequent measures of "solidarity" vis-à-vis the affected "innocent" States?

128. The question has been raised more than once before in the Security Council: in the case of Rhodesia, for example, when the United States recalled that the adoption of embargo measures must not affect the rights of neighbouring States; 130/ and more recently, when China abstained from voting in favour of resolution 757 (1992) (calling for an economic embargo against Serbia and Montenegro) because it deemed the adoption of economic measures inappropriate owing to their possible repercussions on third States. 131/ Security Council resolution 253 (1968), toughening the embargo against Rhodesia, and resolution 748 (1992), whereby the Council adopted economic measures against the Libyan Arab Jamahiriya for involvement in international terrorist activities, moreover, seem to speak in favour of some sort of protection of the interests of "innocent" States. 132/ The problem of the effects of economic sanctions on third States also arose in connection with the freezing by the United States of Iranian assets deposited with foreign branches of United States banks (see ILM 1981, pp. 414 et seq., 769 et seq. and 923 et seq.).

129. Regarding point (iv) above, attenuations are also conceivable with respect to the "functional" aspect of the measures in question. While it is true that in the case of less serious delinquencies, any "punitive" aim plays

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130/ The representative of the United States was referring in particular to Zambia (see Official Records of the Security Council, Twentieth year, 1267th meeting, 9 April 1966, p. 16, paragraph 71).

131/ See S/PV.3082, 30 May 1992, pp. 9-10.

132/ On Security Council resolution 748 (1992) and the Lockerbie affair see, inter alios, B. Graefrath, Leave the Court what Belongs to the Court, On the Libyan Case, (manuscript); M. Arcari, "Le risoluzioni 731 e 738 e i poteri del Consiglio di Sicurezza in materia di mantenimento della pace" in Rivista di Diritto Internazionale, 1992, pp. 932 et seq.; C. Tomuschat, "The Lockerbie Case Before the International Court of Justice" in The Review, 1993, pp. 38-49; E. Sciso, "Può la Corte internazionale di Giustizia rilevare l'invalidità di una decisione del Consiglio di Sicurezza?", in Rivista di Diritto Internazionale, 1992, vol. XXV, pp. 369 et seq.; M. Bedjaoui, "Du contrôle de légalité des actes du Conseil de Sécurité", op. cit. (footnote 121 above) pp. 69 et seq., especially p. 106.

a minor role as it is absorbed, in our view, by the "substantive" content of responsibility (cessation, reparation lato sensu, guarantees of non-repetition), is it not possible that the measures adopted against the author of a "crime" go - as practice seems in some cases to suggest - beyond a strictly reparatory function? We are thinking in particular, but not only, of the case of aggression.

130. One needs hardly recall, for example, how, once the invasion of Kuwait by Iraq had been stopped and hostilities suspended, the United States several times threatened and actually took action against Iraq in order to make it comply with the obligations of guarantee and reparation imposed by Security Council resolution 687 (1991). The severity of such armed measures would be difficult to understand with the mere perspective of performance of the specific obligations imposed upon Iraq or of proportionality with a (presumed) non-performance. 133/ It should be borne in mind, however, that the Security Council itself had decided in resolution 687 (1991) to remain seized of the matter, so as to be able to take "such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area".

131. In addition to the "objective" aspect considered so far for non-armed measures as well as armed measures, one must address the "subjective" aspect, most notably the "institutional" aspect. The sole difference from the problem posed by armed reactions lies perhaps in the lesser "dangerousness" of the measures involved and, consequently, in the lesser concern over the risk of abuse or of ultra vires actions, be it on the part of the injured States in unilateral response or on the part of organs supposedly representing a "common will" of States or the international community.

132. Without again developing this point in detail, let us recall that such "subjective-institutional" questions might be formulated, with regard to non-armed measures, roughly in the following terms:

(a) first of all, do the possible attenuations of the limitations of recourse to "peaceful" countermeasures apply only to the "principal victim" of a crime (if any), or would they benefit all States in any way injured? Or does the entire handling of any countermeasures in case of crime rather belong de lege lata - or should belong de lege ferenda - to the "organized international community"?

(b) if such "collective" competence exists - or ought to be provided for - also in respect of measures not involving the use of arms, would it be an "exclusive" or only a "primary" competence?

(c) in the latter hypothesis, in what manner would the "collective" competence be coordinated with the residual faculté of unilateral action on the part of individual injured States (or groups of injured States)?

133/ See, for example, the statement of President Bush reported in the United States Department of State Dispatch, 21 September 1991, p. 718.

(d) lastly, which "collective" or "institutional" procedures would be suitable to express the "common will" of States?

F. The problem of an "obligation to react" on the part of injured States

133. A last set of problems is that of the possible duties of injured States (as distinguished from their faculté) to take measures against the author of an international crime. We now refer to the kinds of obligations singled out by our predecessor, 134/ foremost among them being the obligations not to recognize as "legal and valid" the acts of the wrongdoing State pertaining to the commission of the breach or the follow-up thereof.

134. International practice shows that States feel often required not to recognize the legal effects of situations produced by a wrongful act, especially an act of aggression. Without going too far back in time, we recall the provision of the Friendly Relations Declaration (General Assembly resolution 2625 (XXV)) that "no territorial acquisition resulting from the threat or use of force shall be recognized as legal", a principle subsequently reiterated by the same body in the Definition of Aggression (resolution 3314 (XXIX)). One will also recall the Declaration on the Enhancement of the Effectiveness of the Principle of Abstention from the Threat or Use of Force in International Relations (resolution 42/22). Another example is the reiterated declarations of illegality both by States and international organs, concerning Israeli "governmental measures" in respect of the occupied territories and the city of Jerusalem. 135/ Under the heading of consequences of aggression, one must also recall the statements of non-recognition of the legal effects of the annexation of Kuwait by Iraq. We refer in particular to Security Council resolutions 661 (1990), 662 (1990)

134/ See Riphagen, Sixth report on State responsibility, in Yearbook ... 1985, Vol. II, Part One, document A/CN.4/389, p. 13, especially article 14 and the commentary thereto.

135/ See, on the Arab and Palestinian territories occupied in 1967: Security Council resolutions 242 (1967) and 465 (1980); on the status of Jerusalem: Security Council resolution 478 (1980), General Assembly resolution 35/169 E of 15 December 1980, the statement by Switzerland in "Pratique suisse", in ASDI, 1981, p. 277 and the declaration of the nine countries of the EEC in EC Bulletin 6/1980, p. 10; on the occupied territories in the Golan Heights: Security Council resolution 497 (1981), General Assembly resolution ES-9 of 15 February 1982, the statement of the Belgian representative to the General Assembly reporting the position of the EEC (BYIL, 1982, p. 531), the relevant declaration of the British Foreign Minister (BYIL, 1982, p. 532), the relevant statement of the permanent representative of France to the Security Council (AFDI, 1982, p. 1047) and Commission on Human Rights resolution 1990/3 of 16 February 1990.

and 670 (1990) and to the stands taken by the Organization of the Islamic Conference, 136/ the League of Arab States, 137/ and the EEC. 138/

135. Regarding breaches other than aggression, one should consider Security Council resolution 217 (1965), urging States not to recognize the "illegal authority" of the racist Rhodesian Government; Security Council resolution 264 (1969) on actions of South Africa in Namibia; and General Assembly resolution 47/20 of 23 November 1992, adopted subsequent to the Haiti coup d'état, condemning "as unacceptable any entity resulting from that illegal situation".

136. In addition to the non-recognition duty, mention is also made of the less delineated obligation not to help or support the wrongdoing States in maintaining the situation created by the unlawful act. International practice does show signs of possible existence of an opinio juris in favour of a duty of States not to assist a wrongdoing State in enjoying on preserving any advantages resulting from acts of aggression and other major breaches.

137. Examples are Security Council resolution 269 (1969), calling "upon all States to refrain from all dealings with the Government of South Africa purporting to act on behalf of the Territory of Namibia; the Council's request to all States "not to provide Israel with any assistance to be used specifically in connection with settlement in the occupied territories" (resolution 465 (1980)); and the more peremptory proclamation of the General Assembly that "international responsibility" would be incurred by "any party or parties that supplied Israel with arms or economic aid that augmented its war potential" (resolution 38/180 (1983)). Worth noting in connection with the same situation are the statements of the Arab League, 139/ the Non-Aligned Movement 140/ and the OAU. 141/

136/ Communiqué of the Nineteenth International Conference (6 August 1990), in The Kuwait Crisis ..., op. cit. (footnote 100 above), p. 306.

137/ Resolution of the extraordinary Arab summit held in Cairo, 10 August 1990.

138/ Statement of the Twelve of 4 August 1990, in The Kuwait Crisis ..., op. cit. (footnote 100 above); communiqué of the extraordinary session held in Brussels on 10 August 1990.

139/ Resolution of the Council of the League of Arab States of 11 June 1981.

140/ Communiqué transmitted to the United Nations on 16 June 1981 (S/14544).

141/ The Council of Ministers of the above-mentioned organization recently requested the United States "to do everything possible to prevent the settlements of migrant Jews in the occupied Palestinian territories" (resolution B, 3-7 July 1990, reported in Quigley, "Loan Guaranties, Israeli Settlements, and Middle East Peace", Vanderbilt Journal of Transnational

138. Also significant is the case of the military and financial support provided by the United States to South Africa in its aggression against, and occupation of, part of the territory of Angola. To the individual protests on the part of Angola, Cuba and the Soviet Union (A/41/218-S/17921 and S/17931), one must add a reprobation by the General Assembly (resolution 41/35 A (1986)), which "affirms the view that the occupation of southern Angola by the racist regime was in large part facilitated by the policies pursued by the United States Administration in the region, especially its support for the armed criminal bandits of the Uniao Nacional para a Independência Total de Angola and its policies of 'constructive engagement and linkage'." Recent confirmations of a possible opinio juris on the "duty not to assist" are the reiteration of the obligation of non-assistance to Iraq by Security Council resolution 661 (1990) and the decision of the Czechoslovak Government (a decision taken on 3 August 1990, prior to Council resolution 661) suspending "all supplies of military character to the Republic of Iraq". At the same time, the Czech and Slovak Federal Republic stopped "delivering also all other items that could be used by Iraq for military purposes". 142/

139. Attention should also be called to the tendency of the European Community, more and more pronounced in recent years, to suspend economic cooperation agreements in the case of serious and persistent violations of human rights and the rights of the people. 143/

140. General mention is also made of the obligations of States not to interfere with the response to a crime on the part of the "international community as a whole" and to carry out such decisions as may be adopted by that community in connection with the sanctioning of a crime.

141. Two questions should not be overlooked in considering such obligations by way of codification or progressive development.

(i) firstly, one should see whether States hold the behaviours in question in compliance with a "special" obligation to react to a crime or merely in the exercise of their faculté to apply, against the wrongdoing State, countermeasures of a similar or identical nature or content.

(ii) secondly, in the measure in which the behaviours in question were found to be (or made) the object of an obligation, it should be

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Law 1992, pp. 558-559).

142/ See The Kuwait Crisis ..., op. cit. (footnote 100 above), p. 101.

143/ See the European Council resolution of 28 November 1991 in EC Bulletin 11/91, p. 124. See also the resolution of the ACP-CE Joint Assembly suspending aid and forms of cooperation vis-à-vis Haiti, and the European Parliament resolution of 22 January 1993 in which the same measure was requested with respect to Equatorial Guinea, (Agence Europe of 23 January 1993).

clarified whether the obligation is provided for by the general law of State responsibility as a response to a State crime or is only indirectly related to the occurrence of a wrongful act. The obligation might derive, in the latter case, from "primary" rules establishing obligations of institutionalized or non-institutionalized cooperation among the States involved, obligations failing which the occurrence of the crime would not bring about the common or concerted action.

SECTION 3

INTERNATIONAL CRIMINAL LIABILITY OF STATES, OF INDIVIDUALS OR OF BOTH?

142. Was it not for the presence, in Part One, of article 19, one could be led to assume that the work of the ILC on international responsibility is based upon a tendential, implied dichotomy between an essentially "civil" responsibility of States, on the one hand, and a penal responsibility of individuals, on the other. This would seem roughly to correspond - despite the relativity of the distinction between "civil" and "penal" responsibility 144/ - to the scope of the draft State responsibility (article 19 of Part One excepted), on the one hand, and the draft Code of Crimes Against the Peace and Security of Mankind, on the other hand. States would only incur civil liability for the breach of their obligations under the law to be codified and developed by the draft articles on State responsibility. Penal liability would only fall on individuals under the Code, either by virtue of international rules directly applicable to individuals or by virtue of rules to be grafted by States into their legal systems as a piece of uniform criminal law. 145/ While individuals are unquestionably amenable in principle to penal justice, States would seem to be in a different situation. Any kind of liability of States would seem to be excluded in principle (except for article 19) from penal sanction either simply because of their collective nature (societas delinquere non potest) or because they are not susceptible of punishment, or because criminal liability would be incompatible with the majesty of a sovereign State. 146/ The

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144/ Learned and thought-provoking developments on this relativity (in municipal and international law) are to be found in the remarkable works of M. Spinedi. I refer mainly to her thorough presentation in Weiler, Cassese and Spinedi (eds.) and more particularly to her "Contribution à l'étude de la distinction entre crimes et délits internationaux" in La Communità internazionale, Quaderni, no. 2, 1984, pp. 12 et seq. especially 19 et seq. and 28 et seq.

145/ After an initial phase of indecision as to whether States themselves could be envisaged as liable for the crimes contemplated by the Code of Crimes against the Peace and the Security of Mankind, the work on this project has now been decidedly based for some time on the assumption that the Code will only cover crimes of individuals although mainly, if not exclusively (considering the nature of the delinquencies contemplated), of individuals occupying responsible positions within the structure of a State.

146/ The maxim societas delinquere non potest was evoked by a considerable number of States opposing the adoption of article 19 of Part One. For Austria (A/C.6/31/SR.20, pp. 2-3 para. 2), "[T]here could be no doubt that the Commission was suggesting a radical change in the basic concept of State responsibility by introducing the notion of 'international crime', whereas under contemporary international law that notion had been reserved exclusively for individual penal responsibility. Legal doctrine had long ago rejected the idea of collective guilt and collective punishment. It would be

liability of States under the State responsibility project is indeed understood by the present majority of the ILC as strictly confined to the obligation to make reparation, no punitive function being implied therein. 147/ Within the framework of the State responsibility, draft article 19 might thus be viewed as an inconsistent element. 148/

143. This Special Rapporteur is able to share unconditionally neither the view that States would, by nature, not be susceptible of penal responsibility under present international law nor the view - only partly overlapping therewith - according to which international State responsibility would be confined de lege lata within the narrow analogy with the responsabilité civile (civil liability) of national law. State responsibility under international law also presents, despite the prima facie exclusivity of the municipal civil law analogy, municipal penal law analogies. But before that, let us begin with the first point, namely, the alleged incompatibility of penal responsibility with the general nature of the State.

144. The first and main cause of the alleged incompatibility is the maxim societas delinquere non potest. This maxim is surely justified, in a measure, for juridical persons of municipal law and for the State itself as a personne morale of national law. It is very doubtful, however, that it is justified for such entities as States as international persons. For entities such as these, the maxim is as untenable in theory as it is untenable in practice. In theory, the reason why societas delinquere non potest resides essentially in the "collective", abstract, legal nature of juridical persons as opposed to the physical unity of natural persons. Both as a collective entity and as an instrument of legal relations among natural persons, the juridical person - e.g., a private company - is to some extent not susceptible

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unfortunate if there were a revival of that obsolete idea, as a result of establishing the international criminal liability of States". France (A/C.6/31/SR.26, p. 4, para. 7) held that "to establish a new type of State responsibility would be to establish a sort of collective criminal responsibility, which was contrary to the modern penal law". According to Israel (A/C.6/31/SR.28, p. 5, paras. 16, 17, 18), "to introduce the notion of an international crime for which the State would be accountable would be a retrograde step and a breach of the time-honoured maxim impossibile est quod societas delinquat" (ibid., para. 17). A more nuanced view in the sense of the undesirability of criminalizing States was held by the United States (A/C.6/31/SR.17, pp. 3-4, paras. 8-12); Japan (A/C.6/31/SR.21, p. 3 para. 8); the Federal Republic of Germany (A/C.6/31/SR.24, pp. 12-13, para. 71); Australia (A/C.6/31/SR.27, p. 6, para 20); and Portugal (A/C.6/31/SR.23, p. 6, para 17).

147/ Rather contradictorily, in our view, a punitive function would have to be excluded (in the form of punitive damages or otherwise) even from such obviously sanctioning forms of reparation as the various kinds of satisfaction and guarantees of non repetition.

148/ Compare M. Spinedi, Contribution ..., op. cit. (footnote 144 above), pp. 9-19.

of penalty either because it is not susceptible of physical penalties or because penal responsibility is attached to its representatives or members. This difficulty, however, is surely not an absolute one; and there are instances of criminal liability of corporations. More difficult to conceive, on the other hand, is a criminal responsibility of a State as a juridical person of national law. The reasons are too obvious for us to expand on them here.

145. States as international persons, however, are a different matter. Although they present themselves as collective entities, they are not quite the same thing, vis-à-vis international law as the personnes morales of municipal law. On the contrary, they seem to present the features - from the viewpoint of international law - of merely factual collective entities. 149/ This obvious truth, concealed to students by the rudimentary notion of juridical persons themselves as factual collective entities, finds the most obvious recognition in the commonly held view that international law is the law of the inter-State system and not the law of a world federal State.

146. Coming now to the second cause of alleged incompatibility, however strongly one may believe that the liability of States to be covered by the draft does not go beyond the strict area of reparation, the practice of States shows that the entities participating in international relations are quite capable of criminal behaviour of the most serious kind. In the words of Drost (a strong opponent, at the same time, of any "criminalization" of States), "[U]ndoubtedly, the 'criminal' State is far more dangerous than the criminal person by reason of its collective power". 150/ The study of the same relations - whether from the viewpoint of politics, morality or law - also shows that just as they can act delinquently towards each other, the same entities are not infrequently treated as delinquents by their peers, the treatment being expressly or implicitly punitive - and often very seriously

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149/ G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations, (Appendix)", in Hague Collected Courses (1972-III), pp. 629 et seq., especially para. 123; "State Fault and the Forms and Degrees of International Responsibility" in Le Droit International au Service de la Paix, de la Justice et du Développement (Mélanges Virally), 1991, pp. 29-31; and "Le Domaine réservé, Cours général de droit international public" in Hague Collected Courses (1990-VI), pp. 439 et seq., especially pp. 443-446.

150/ P.N. Drost, The Crime of State, I, Leyden, 1959, p. 294. After a strongly argumented plea against any idea of a penal liability of States - a plea based essentially upon the maxim societas delinquere non potest - he admits however that "criminal" States are actually the target of "political" measures (as distinguished by him from legal penalties) in which it is very difficult not to recognize as many forms of severe punishment. Drost's list is reproduced in paragraph 147 below, and again considered in paragraph 154 (iii) infra. But Drost is just one example among many.

punitive. 151/ One should not be led astray by the consideration, in addition to the maxim societas delinquere non potest, that States are not subject in international law, unlike individuals in municipal law, to such institutions as public prosecutors and criminal courts. Of course, the persistently non-institutionalized structure of the inter-State system ordinarily confines the responsibility relationship between injured State and law-breaking State within a bilateral, merely horizontal relationship, no part being normally played by any third party, far less any authority. It follows that any reaction to an internationally wrongful act remains in principle a matter of choice for the injured party, whatever the risks that such a choice may involve. It is for the injured party to claim cessation, reparation and/or satisfaction and to resort to reprisals in order to pursue such ends. Liability for internationally wrongful acts would thus seem to fit, prima facie, exclusively within the civil liability, private law model of municipal law systems. Despite such prima facie evaluation, however, it is not difficult to realize, if only one tries to reach beyond the surface of the "injured State/law-breaking State's relationship", that the content of that relationship is not a purely "civil" or "reparatory" one - even assuming an absolute distinction. Even in the case of the most ordinary wrongful acts (other that those contemplated in article 19 of Part One), the absence of a punitive element is only apparent.

147. In the most ordinary cases of internationally wrongful conduct, the penalty is either implicit in the fact of ceasing the unlawful conduct and making reparation by restitution in kind or compensation, or visible in that typically inter-State remedy which is known under the term of art of "satisfaction". In the most serious cases, such as those calling for particularly severe economic or political reprisals or outright military reaction, followed by more or less severe peace settlements the punitive intent pursued and achieved by the injured States is manifest. Suffice it to refer again to Drost, who candidly singles out the various forms of "political" measures (against States) that he distinguishes from "legal penalties" (against individual rulers), as follows:

> "These political measures, twice collective in being collectively determined and enjoined as well as collectively borne and endured, take on all sorts of forms, ways and means. Territorial transfer; military occupation; dismantling of industries; migration of inhabitants; reparation payments in money, goods or services; sequestration or confiscation of assets; armaments control; demilitarization; governmental supervision; together with many other international measures including the two general categories of economic and military sanctions" 152/

151/ See Drost, ibid. Even Graefrath and Mohr, who also oppose the possibility of inflicting punitive sanctions against States, nonetheless admit the legitimacy of measures which are severely punitive in substance: see B. Graefrath and M. Mohr, "Legal Consequences of an Act of Aggression: the Case of Iraqi Invasion and Occupation of Kuwait", in Austrian Journal of International Law, 1992, pp. 109 et seq.

152/ Drost, op. cit. (footnote 150 above), pp. 296-297.

The cited author seems not to suspect that most of the measures he lists not only include quite "civil" remedies but are all such as to affect - some of them most dramatically - those very peoples he rightly wants to spare from sanction by confining the "legal penalties" to the rulers. More on this point in paragraph 158 infra.

148. The fact that numerous scholars and diplomats of international law prefer to conceal such obvious truths under the fig leaf represented either by the omission of any reference to a punitive connotation of international responsibility (or in the suggested express indication that the only function of countermeasures is to secure reparation) does not alter the hard realities of the inter-State system. It is indeed recognized by the most respected authorities that international liability presents civil and penal elements, the prevalence of one or the other depending upon the objective and subjective features and circumstances of each particular case. In the most serious cases, the so-called civil element is absorbed into the penal one, while, in the most common, minor breaches, the penal element is absorbed into the civil one. In any case, the presence of a covert or overt penal element is not excluded by the fact that sanction is inflicted not by an institution but by the injured party or is even self-inflicted by the wrongdoing State itself. 153/ The extension to sovereign States of the maxim societas delinquere non potest is not any closer to the truth in practice than it is in theory.

149. A staunch critic of the idea underlying article 19 of Part One could of course contend - not without some justification - that if the maxim societas delinquere non potest is incompatible with the present features of sovereign States and of the inter-State system, it might well become compatible with the features which that system may hopefully present in a more or less close or distant future. That critic could contend in particular that if States are at present not societates or personnes morales in the proper sense of the term, they would have inevitably to become societates or personnes morales in a proper sense within an organized - real - legal community of mankind. States would then not differ, in essence, from the subdivisions of a more or less decentralized federation. They would thus have become legal subdivisions of the legal community of mankind, and as such less (or not) susceptible of penal responsibility and only susceptible of "civil" - merely reparatory -

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153/ That the absence of an institution is not the decisive factor is also shown by the fact that in national legal systems the institution is present in the implementation not only of penal but also of a civil liability. Were the absence of an "over and above" institution such a decisive element to exclude any form of international penal liability (as the tenants of the view under discussion seem to believe), one would have to admit that the same gap exists with respect to any form of international (civil) liability, and, for that matter, with respect to any other aspect of international legal relations.

liability. Penal liability could only be attributable, within such a framework, to the rulers, the officials, the representatives, not to the State as an institution. 154/

150. In the measure in which it could be assumed that such a "futurible" could be a valid prediction, the same staunch opponent to the idea embodied in article 19 could further contend that the right way for the ILC to proceed would be precisely to maintain the distinction alluded to at the outset of the present subsection (paragraph 142). We refer to the distinction between a "Code of crimes against the peace and security of mankind" covering exclusively the penal liability of individuals, on the one hand, and a State responsibility project envisaging a merely civil liability of States, on the other hand. According to the same "staunch opponent", this "civil" liability of States should be codified and developed by a convention on State responsibility of which article 19 would not be a part. This would be, always according to that opponent, the way to harmonize the ILC's current project with the presumable lines of progressive development of the international system towards the "ultimate" end - to use Lorimer's adjective 155/ - represented by the establishment of a more or less centralized (or decentralized) organized community of mankind.

151. It seems equally evident, however, that the establishment of such a legal community is immeasurably far from behind the corner. We refer to the establishment of a really interindividual legal community of mankind, legally organized under appropriately representative institutions encompassing in a

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154/ Curiously, the very opposite seems to have been suggested by some authors. According to Schwarzenberger and von Münch (in International Criminal Law, Mueller and Wise, ed., pp. 35-36 and p. 54, respectively). According to Schwarzenberger,

> "[i]n such a situation, an international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority which is superior to these States. In reality, however, any attempt to enforce an international criminal code against either the Soviet Union or the United States would be a war under another name. Thus, proposals for a universal international criminal law fall into the category of the one-way pattern of the reorganization of the international society. With other schemes of this type they share the deficiency of taking for granted an essential condition of their realization, a sine qua non which cannot be easily attained: the transformation of the present system of world power politics in disguise into at least a world federation. If, and when, the swords of war are taken from their present guardians, then, and only then, will the international community be strong enough to wield the sword of universal criminal justice" (ibid.).

Compare, however G. Dahm, Völkerrecht, 1959, pp. 265-266 and 270-271; and M. Spinedi, Contribution ... (footnote 144 supra), p. 31.

155/ Lorimer, Institutes of the Law of Nations, vol. 2, 1884, pp. 183 et seq.

sense the States themselves as equally representative legal institutions of the respective national communities. States would thus become to some degree less dissimilar, as noted supra, from the subdivisions of a democratically organized federal State. But a development such as this would presuppose nothing less than the political and legal integration of all peoples into one people to a degree at least comparable, in some measure, to the process which took place in North America with the establishment of the federal constitution and which is still far from having even started among the peoples of the 12 member States of the European Community. It is a process which would take a fairly high number of generations, if not centuries.

152. The inevitable consequence is that mankind will for a long time to come remain, for good or evil, in that condition of lack of integration which is, at one and the same time, the main cause and the main effect of what sociologists and lawyers call the inter-State system in a technical sense.

153. Within such a system, States seem to be bound to remain, whether one likes it or not, under an international law which is inter-State law, not the law of the international community of mankind. Within the inter-State system and under its law - international and not supranational - States remain essentially factual and not juridical collective entities. As such, they remain not only able to commit unlawful acts of any kind - notably the so-called "crimes" as well as the so-called "delicts" - but equally susceptible of reactions quite comparable - mutatis mutandis - to those which are met by individuals found guilty of crimes in national societies.

154. Much has rightly been written in order to condemn "collective" responsibility. 156/ This Special Rapporteur is indeed firmly convinced that it is a decidedly primitive, rudimentary institution. It would be difficult to escape, on the other hand, the following obvious constats:

(i) the inter-State system is, from the standpoint of legal development, at a stage which - although it is far from primitive, considering it has been there for centuries - presents rudimentary aspects which cannot be ignored without danger;

(ii) one such aspect is that States do commit, together with delinquencies one can qualify as "ordinary" or "civil", also delinquencies which decidedly qualify, because of their gravity, as "criminal" in the common sense of this term.

(iii) another aspect is that States oppose to such grave delinquencies, for example to aggression, forms of reaction which even as strong an opponent of the penal liability of States as Drost admits to be so severe and numerous as those mentioned in paragraph 146 supra. As Drost himself classifies the forms of reaction in question (called by him "political" measures to distinguish them from "individual penalties"), they "may be territorial, demographic and

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156/ See, inter alios, H. Kelsen, Pure Theory of Law, tr. by M. Knight, Los Angeles- London, 1978, pp. 121-122, and 324 et seq.

strategic; industrial, commercial and financial; even cultural, social and educational; last not least technological and ideological". 157/

It is really hard to believe that measures of such tremendous weight are not, mutatis mutandis, abundantly similar, in their effects, to the penalties of national criminal law.

155. In conclusion, it would seem that at least for some time, presumably a long one, lawful reactions to the kind of delinquencies contemplated in article 19 should be available. The International Law Commission should therefore provide, in Parts Two and Three of the draft, follow-up provisions to article 19.

156. The problems to be solved, however, seem to us to be, de lege lata or ferenda, even more difficult than those, not yet resolved satisfactorily, of collective security. This is especially true for those, among such problems, that are related to the present structure of the so-called "organized international community".

157. A number of the issues involved - de lege lata or ferenda - have been summarily and tentatively evoked in the preceding section. Others have not. Subject to the further additions and corrections from our colleagues, we must add, before closing for this year, three more issues.

158. A most crucial problem is that of distinguishing the consequences of an international State crime for the State itself - and possibly the State's rulers, on the one hand, and the consequences for the State's people, on the other. To confine ourselves to the very useful term of comparison represented by Drost's study (a not very consistent opponent, as shown, of the "criminalization" of States), that writer most rightly stresses the moral and political necessity of separating the political measures against the delinquent State from the individual penalties against its responsible rulers, the former measures to be of such a nature as to spare (not to hit) the "innocent" population of the "criminal" State. One cannot but express wholehearted agreement. Considering however the kinds of measures Drost himself seems to admit so liberally (para. 147 supra) - measures which seem to go pretty much beyond those contemplated in Articles 41 and 42 of the Charter - it does not seem easy to make the distinction. This is especially true with regard to economic and peace-settlement measures (for the case of aggression), some of which seem to hit the people itself directly. And there is also a further question that neither the sociologist nor the lawyer or the moralist should ignore (although the cited author seems totally to ignore it). The question is: Can it be assumed in any circumstances that a people is totally exempt from guilt - and liability - for an act of aggression conducted by the obviously despotic regime of a dictator enthusiastically applauded prior, during and after the act?

159. The second problem is that of State fault. Should or should not the Commission reconsider that matter which it set aside (for us unconvincingly)

157/ Drost, op. cit. (footnote 150 above), pp. 296-297.

with regard to the "ordinary" delinquencies? Is it possible to deal, as "material legislators", with the kind of breaches contemplated in article 19 without taking account of the importance of such a crucial element as wilful intent?

160. The last problem to which we feel it indispensable to call the Commission's attention is article 19 itself. We leave aside the seriously problematic features of that article's formulation, a formulation which was perhaps, in our view, less difficult in the original version proposed by the Special Rapporteur of 1976. Those features, not the least of which is the unclear nature of the provision as compared with the so-called "secondary" character of the other articles of the draft, could be reconsidered by the Commission on second reading.

161. We refer, for the present purposes, to substantive questions such as the following:

(i) If there exist substantial or, in any event, significant differences in the manner in which the various specific types of crime are dealt with (e.g., aggression, slavery, pollution), is it in fact appropriate to elaborate a single dichotomy between "crimes" on the one hand and "delicts" on the other? Would it not be preferable, for example, to distinguish aggression from other crimes? Or to make several subordinate distinctions, so as to avoid placing on the same footing specific acts that are obviously quite remote from one another and would or should entail equally different forms of responsibility?

(ii) The exemplary list of wrongful acts constituting crimes which is contained in article 19 dates back to 1976. Are those still the best examples for identifying the wrongful acts which even today the international community as a whole considers, or would do well to consider, as "crimes of States"? In other words, could not that list of examples, if indeed it is desirable to maintain a list, be "updated"?

(iii) In examining practice, it is often difficult to distinguish cases of crime from cases of delict, especially where very serious delicts are involved. Might not the reason lie partly in the manner in which the general notion of crime contained in article 19 is formulated, with wording characterized by certain elements that perhaps render it difficult to classify a breach as belonging to the category of crimes or that of delicts and hence to ascertain which unlawful acts now come, or ought to be placed, under a regime of "aggravated" responsibility? Consider, for example, the element of "recognition by the international community as a whole", or that of "seriousness", left equally imprecise.

(iv) If it is true that there exists a certain gradation from ordinary violations to "international crimes", especially from the point of view of the regime of responsibility which they entail, is it in fact proper to make a clear-cut nominative distinction between "crimes" and "delicts"?